No. 84689

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IN THE
SUPREME COURT OF MISSOURI

_____

STATE OF MISSOURI,

Respondent,

v.

DEDRIC RASH,

Appellant.

_____

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit
Honorable Emmett M. O'Brien, Judge

_____

RESPONDENT'S SUBSTITUTE BRIEF

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a conviction, in the Circuit Court of St. Louis County, for attempted kidnaping, §§ 564.011 and 565.110, RSMo 2000, and robbery in the second degree, §569.030, RSMo 2000. Appellant was sentenced to consecutive terms of twenty years' imprisonment for the kidnaping conviction and thirty years' imprisonment for the robbery conviction. Jurisdiction in this case is proper because this Court granted transfer after an opinion by the Missouri Court of Appeals, Eastern District, pursuant to Article V, §10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant, Dedric Rash, was charged by indictment on June 1, 2000 with the class C felony of attempted kidnaping and the class B felony of robbery in the first degree (L.F. 5-6). An information in lieu of indictment was filed on November 13, 2000 charging him as a prior and persistent offender pursuant to §558.016, RSMo 2000 (L.F. 7-8).

Before trial, both parties filed several motions in limine; the only motion that is relevant for purposes of appeal is the state's motion to prevent the defendant from making an opening statement when the defendant was not going to adduce any evidence in his case-in-chief. (L.F. 10-16). Judge O'Brien granted this motion, barring the defendant from making an opening statement (Tr. 15). This is the sole issue on appeal (App. Br. 10-17). Rash was tried before a jury on November 13, 2000, the Honorable Emmett O'Brien presiding (Tr. 32).

Considered in the light most favorable to the verdicts, the evidence showed that on the evening of May 4, 2000, Sarah Kaufman, a student at Washington University in St. Louis County, drove her 1991 Ford Explorer onto a campus parking lot (Tr. 157, 186, 291). She had her books and laptop computer, and she was going to the library to prepare for upcoming final exams (Tr. 150, 152, 177). She exited through the driver's side front door and opened the driver's side back door to remove her backpack (Tr. 157).

Appellant suddenly attacked her from behind (Tr. 157, 177, 186, 199). He pushed her and told her to get in the car (Tr. 158). She pushed back and tried to scream, but he punched her in the mouth (Tr. 158). Appellant covered her mouth with his hand, and she bit his hand (Tr. 158, 188). He told her not to bite his hand and then appellant bit her hand (Tr. 158, 188-89).

Ms. Kaufman was laying on the back seat of the vehicle; she tried to sit up, but appellant punched her in the forehead (Tr. 159, 187). A subsequent punch knocked Ms. Kaufman's glasses off her face; she is nearsighted (Tr. 159-160, 188, 191). At this point, Ms. Kaufman thought appellant was going to "beat me to death" (Tr. 161). The vehicle's interior light was on during Ms. Kaufman's struggle with appellant (Tr. 160). In the course of the struggle, Ms. Kaufman's car keys were knocked from her hands (Tr. 160).

After deciding her only choice was to cooperate, Ms. Kaufman moved into the middle rear seat of her Explorer and appellant got in the back seat with her (Tr. 161, 189). Appellant asked Ms. Kaufman how to turn off the dome light, she told him that the lights go off when the engine is started (Tr. 163). Appellant told Ms. Kaufman to get into the front passenger seat of the car–she complied (Tr. 163, 189). Appellant then climbed into the driver's seat and turned on the engine (Tr. 163, 190).

Appellant told Ms. Kaufman not to run away and he tried to lock the vehicle doors, but pressed the window buttons instead (Tr. 164). He asked Ms. Kaufman how to lock the doors (Tr. 164). In response, Ms. Kaufman opened the passenger door and leaped from the vehicle (Tr. 164). Appellant grabbed the back of her shirt, but she broke free (Tr. 164). Appellant put the vehicle in reverse and backed up, striking Ms. Kaufman with the open passenger door (Tr. 164). Appellant drove away in Ms. Kaufman's vehicle with her textbooks, laptop computer, video camera and cellular telephone (Tr. 166-67, 191, 222). Ms. Kaufman ran to a nearby emergency phone and notified police who responded immediately (Tr. 165).

Detective Robert Marbs of the Washington University Police Department interviewed

Ms. Kaufman (Tr. 220-21). Based on the information she provided, Detective Marbs obtained phone records of Ms. Kaufman's cell phone (Tr. 221-22). He contacted the address linked to the first number called from Ms. Kaufman's cell phone after the crime (Tr. 223). Esther Green lived at that address in Jennings, Missouri and remembered that a telephone call awakened her early on the morning of May 4, 2000 (Tr. 206). She recognized the caller as appellant and identified him at trial (Tr. 207-08). Green's caller ID indicated an incoming call from Ms. Kaufman's cellular telephone within an hour of the attack (Tr. 211, 215).

Detective Marbs also assembled a lineup for identification purposes (Tr. 226). Ms. Kaufman identified appellant as the person who attacked her (Tr. 170-71, 173, 198, 200, 228). Detective Marbs subsequently obtained a warrant for appellant's arrest (Tr. 229).

Nine days after the crime, police arrested appellant in Albuquerque, New Mexico (Tr. 274). At the time, he was riding in Ms. Kaufman's Ford Explorer (Tr. 273, 282, 291). After the vehicle was returned to Ms. Kaufman's parents in New York, Rita Kaufman, Ms. Kaufman's mother, was cleaning the vehicle and discovered a paycheck stub bearing appellant's name (Tr. 253, 292-93). She sent it to police (Tr. 253, 292-93).

At trial, appellant presented no evidence on his behalf. At the close of the evidence and after argument of counsel, the jury found appellant guilty of attempted kidnaping and second degree robbery (Tr. 346). Judge O'Brien found that appellant was a prior and persistent offender pursuant to §558.016, RSMo 2000, and sentenced him to consecutive terms of twenty

years for the kidnaping conviction and thirty years for the robbery conviction (Sent. Tr. 4)[1].

On June 4, 2002, the Missouri Court of Appeals for the Eastern District affirmed appellant's convictions. State v. Rash, No. ED79178, Memo. Op. (Mo. App. E.D. June 4, 2002). This Court granted transfer on August 27, 2002.

[1] The transcripts on appeal are bifurcated; respondent designates trial transcript as "Tr." and sentencing transcript as "Sent. Tr."

ARGUMENT

Appellant's claim that the trial court erred when it sustained the state's motion in limine preventing defense counsel from making an opening statement at trial is not appealable because rulings on motions in limine are not final rulings and are subject to change during the course of the trial in that defense counsel never asked the trial court to reconsider its ruling at trial, but reserved her opportunity to make an opening statement and thereafter never offered an opening statement.

In any event, the trial court did not plainly err because it did not prevent appellant from making an opening statement at trial. Further, appellant has failed to show that he suffered manifest injustice because his pre-trial offer of proof was so skeletal as to not aid the jury, because the nature of the defendant's evidence adduced on cross-examination was brief and because of the overwhelming evidence of his guilt.

Appellant claims that the trial court erred when it sustained the state's motion in limine and when it prevented defense counsel from making an opening statement at trial (App. Br. 10-11). He argues that this Court's recent decision in State v. Thompson, 68 S.W.3d 393 (Mo. banc 2002), is "directly on point" and requires reversal and remand for a new trial (App. Br. 17).

A. Factual Background

Before trial, the state filed a motion in limine asking that the trial court forbid defense counsel from making an opening statement in the absence of any evidence in the defendant's case-in-chief (L.F. 10-16). The trial court gave defense counsel an opportunity to give an offer

of proof and state the facts she planned to present in her opening statement (Tr. 28-30). Counsel stated that she planned to present the following facts: the details of the victim's description to Detective Marbs, the victim's state of mind during the attack, the location of her eyeglasses when she was attacked, the certainty of her identification of appellant, the seating arrangement in the victim's vehicle when police apprehended appellant in New Mexico riding in the victim's car, the condition of the victim's vehicle, and the compilation of Detective Marbs' lineup (Tr. 28-30). (The entirety of defense counsel's discussion with the trial court appears in the appendix to this brief.).

Pursuant to the prevailing law at the time, *see* State v. Gibson, 684 S.W.2d 413 (Mo. App. E.D. 1984), the trial court granted the state's motion, barring the defendant from making an opening statement (Tr. 15). At trial, after the prosecutor's opening statement, defense counsel told the trial court that she would not make an opening statement and then she reserved her opening statement (Tr. 130). Defense counsel cross-examined the state's witnesses and then, without ever attempting to make an opening statement, rested immediately after the state's case-in-chief (Tr. 303).

On appeal, appellant's claim is two-fold: first that the trial court erred when it sustained the state's pre-trial motion in limine, and second that the court erred when it prevented appellant from making an opening statement at trial (App. Br. 10-11, 14).

B. Appellant's Claim that the Trial Court Erred When It Sustained the State's Motion in Limine is Not Appealable

To the extent that appellant is claiming that the trial court erred when it sustained the state's pretrial motion in limine, that claim is not appealable because pre-trial rulings on motions in limine preserve nothing for appellate review. State v. Cole, 71 S.W.3d 163, 175 (Mo. banc 2002). "A ruling in limine is interlocutory only and is subject to change during the course of the trial," as a result, such a motion "preserves nothing for appeal." Id.; State v. Copeland, 928 S.W.2d 828, 848 (Mo. banc 1996) *cert. denied,* 519 U.S. 1126 (1997). Thus, the part of appellant's complaint that addresses the trial court's pre-trial ruling is not appealable.

C. The Trial Court Did Not Plainly Err

1. During the Trial, the Court Did Not Refuse to Permit Appellant to Make an Opening Statement.

To the extent that appellant claims that the trial court erred at trial by "refusing to permit defense counsel to make an opening statement" his claim fails because the trial court never prevented defense counsel from making an opening statement at trial (App. Br. 10-11). The following colloquy occurred at trial after the state's opening statement but before the commencement of its case-in-chief:

> The Court: Ms. Freter [defense counsel], did you wish to make an opening statement?
>
> Ms. Freter: Your Honor, may we approach for a moment, please?

(The following proceedings were had at the bench:)

Ms. Freter: Your Honor, at this time I would like to make an opening statement. However, based on the Court's motion in limine sustaining the State's motion in limine prior to trial, I don't feel that the Court's ruling will permit me to make an opening statement. I would incorporate all of the arguments that I made earlier when we were discussing the State's motion in limine at this time.

The Court: This statement is for the record?

Ms. Freter: That statement is for the record, Judge.

(The proceedings returned to open court.)

Ms. Freter: Your Honor, I will reserve my opening statement

(Tr. 130)

The foregoing quote reveals that trial court did not make any ruling at trial, did not grant or sustain an objection nor did it prevent counsel from making an opening statement. The only thing the trial court did was ask defense counsel if her statement was for the record (Tr. 130). The court did not, as appellant contends, "refus[e] to permit defense counsel from making an opening statement" (App. Br. 10-11). Thus, the court did not err because it took no action.

Not only did the trial court not make any ruling or take any action at trial, but defense counsel failed to take any action. To preserve this claim for review, counsel was required to ask the Court at trial to reconsider its pre-trial ruling. Copeland, 928 S.W.2d at 848. ("Motions in limine preserve nothing for review unless objections are made at the appropriate

time during the case."). "Such a requirement is strictly applied because the trial judge should be given an opportunity to reconsider his prior ruling against the backdrop of the evidence adduced at trial." State v. Boyd, 992 S.W.2d 213, 218 (Mo. App. E.D. 1999). *See also* State v. Childers, 853 S.W.2d 332, 335 (Mo. App. W.D. 1993).

Defense counsel took no such action–she never made an objection, she never asked the trial court to reconsider its earlier ruling and she never attempted to make an opening statement. Instead, counsel proceeded on the assumption that the trial court would not change its ruling. Thus, appellant's claim is not preserved for review.

On appeal, appellant claims that defense counsel, "did all she could reasonably have been expected to do" (App. Br. 15). Yet, all counsel did was inform the trial court that she assumed he would not change his mind and then reserve her opening statement (Tr. 130). Surely, it was not beyond reason for defense counsel to ask the court to reconsider its earlier ruling–yet she failed to do so.

Hence, because defense counsel did not grant the trial court an opportunity to reconsider its ruling at trial, appellant's claim is not preserved for appellate review. Cole, *supra*. *See also* Wilkerson v. Prelutsky, 943 S.W.2d 643, 646 (Mo. banc 1997). Nor did the court err in prohibiting appellant from making an opening statement during the trial when the court never made such a ruling.

2. Appellant Failed to Show that He Suffered Manifest Injustice

Under these circumstances, appellant's point on appeal is reviewable, if at all, for plain error only. State v. Rousan, 961 S.W.2d 831, 842 (Mo. banc 1998) *cert. denied*, 524 U.S. 961

(1998). Plain error occurs when the record demonstrates "the error so substantially affects the rights of the defendant that a manifest injustice or miscarriage of justice results." State v. Galazin, 58 S.W.3d 500, 507 (Mo. banc 2001). "The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." State v. Roberts, 948 S.W.2d 577, 592 (Mo. banc 1997) *cert. denied*, 522 U.S. 1056 (1998).

Appellant bears the burden of showing manifest injustice resulting from plain error. Galazin, *supra* at 507. He must demonstrate "that manifest injustice or a miscarriage of justice will occur if the error is not corrected." State v. Worthington, 8 S.W.3d 83, 87 (Mo. banc 1999) *cert. denied*, 529 U.S. 1116 (2000). *See also* State v. Cella, 32 S.W.3d 114, 117 (Mo. banc 2000) ("It is fundamental that on appeal the trial court's action is presumed to be correct, and the burden is on the appellant to establish that the action was erroneous.").

Appellant has failed to demonstrate manifest injustice because he has not shown that had defense counsel presented the opening statement she told the court she was going to present, the outcome of the trial would have been different. Galazin, *supra*. The record reveals only one instance where defense counsel offered the trial court some idea of the facts she planned to present in an opening statement–and appellant fails to show that the presence of an opening statement containing those facts would have caused the jury to disregard the overwhelming evidence of his guilt and acquit him. Worthington, *supra*.

An opening statement is designed to "inform the judge and jury of the general nature of the case, so they may appreciate the significance of the evidence as it is presented." State v.

Thompson, 68 S.W.3d 393, 394 (Mo. banc 2002). An opening statement is an opportunity for each side of a given case to tell the jury the evidence they plan to present and its importance. *See* Best v. District of Columbia, 291 U.S. 411, 415, 54 S. Ct. 487, 489, 78 L. Ed. 882, 885 (1934); Hays v. Missouri Pac. R.R. Co., 304 S.W.2d 800, 804 (Mo. 1957).

In defense counsel's pre-trial offer of proof, she outlined for the court facts that she planned to present in an opening statement, which included facts relating to the specifics of the attack, the victim's description and identification of appellant, where people were seated in her vehicle as well as the condition of her vehicle when police discovered it and the police lineup (Tr. 28-30).

At trial, counsel cross-examined six out of seven witnesses (Tr. 131-302). The cross-examinations consumed 88 pages–the entirety of the testimony at trial consumed 171 pages (Tr. 131-302). Of those 88 pages of cross-examination, the number of pages containing the same facts defense counsel proposed in her offer of proof is at most 34 pages (Tr. 178-79, 182-83, 188, 194, 190-92, 196, 199-200, 212-17, 257-66, 270-71, 282-83, 298-300). Thus, counsel's pre-trial offer of proof encompassed facts that would later appear in less than 40% of her actual cross-examination at trial. In light of these statistics, appellant has failed to show that had he presented to the jury the facts he told the trial court he was planning to present, the jury would have acquitted him.

Moreover, in his only attempt to show actual prejudice, appellant lists facts in his brief that he claims trial counsel elicited on cross-examination (App. Br. 13). He then argues that, "defense counsel should have been allowed to discuss in opening statement the factual

evidence she intended to elicit from the state's witnesses" on cross-examination (App. Br. 14).

The fatal flaw in this argument is that none of the facts appellant presents in his brief appear in counsel's actual offer of proof before trial (Tr. 28-30). Instead of focusing on the facts presented to the court in the pre-trial offer of proof, appellant presents new facts to this Court and argues that the trial court erroneously failed to allow him to present these facts in an opening statement (App. Br. 13-14). Yet, he never presented these same facts to the trial court either before or during trial. As a result, the appellate court may not review these facts. *See* State v. Chaney, 967 S.W.2d 47, 55 (Mo. banc 1998) *cert. denied,* 525 U.S. 1021 (1998) ("Such evidence will not be considered on appeal as it was not preserved by presentation to the trial court in the defendant's offer of proof.").

Under these circumstances, appellant has failed to show manifest injustice–i.e. had the facts defense counsel announced in her offer of proof been presented to the jury in an opening statement (not as evidence[2]) the jury would have acquitted him. Worthington, *supra*. Galazin, *supra*. Thus, because appellant has the burden to show that he suffered manifest injustice and because he has failed to carry that burden, his claim on appeal fails.

Moreover, appellant has failed to show that an opening statement would have persuaded the jury to disregard the evidence of his guilt, which follows, and acquit him:

Sarah Kaufman, the victim, testified at trial that she had "no doubt" that appellant was the

[2] Instruction 2, directed the jurors that "[t]he opening statements of attorneys are not evidence."

person who attacked her (Tr. 177, 199-99). She also identified him prior to trial in a lineup (Tr. 170-71, 173, 198, 200, 228). Immediately after the crime, appellant used the victim's cellular telephone to call the residence where he was living prior to the attack (Tr. 207-08, 211, 215).

Appellant listed that telephone number and corresponding address on his job application when he applied to work on the Washington University campus a few months before the attack– he was fired from that job the day he assaulted Sarah Kaufman (Tr. 132, 135-136). The person who answered the telephone when appellant called the night of the crime was Esther Green, the very individual appellant had listed on his job application as a reference (Tr. 135). At trial, Ms. Greene identified appellant as the caller that night (Tr. 207-08).

Further, appellant was eventually apprehended riding in the evidence of the crime– Albuquerque police arrested appellant after determining that the 1991 Ford Explorer in which was riding was stolen (Tr. 273-74, 282, 291). The vehicle was registered to the victim's mother, Rita Kaufman of Scarsdale, New York (Tr. 276-77). Following appellant's arrest, the victim's mother discovered appellant's pay stub from the job he held with held at Washington University food services in the victim's Ford Explorer (Tr. 253, 292-93).

Thus, because appellant has failed to preserve his claim at trial and because he failed to show that had defense counsel given an opening statement the jury would have ignored the overwhelming evidence of his guilt and acquitted him, his claim on appeal entitles him to no relief.

D. This Court's Recent Decision in <u>Thompson</u>

Does Not Require Reversal in this Case

This Court recently held in State v. Thompson, 68 S.W.3d 393 (Mo. banc 2002), which dealt with a preserved claim, that an "absolute ban" on opening statements that purport to encompass only facts defense counsel plans to procure on cross-examination of the state's witnesses is error. Id. This Court found that the defendant in Thompson was prejudiced–i.e. there was a "reasonable probability" of a different verdict–by the absence of an opening statement. Id. at 395-96.

In Thompson, the state moved in limine before trial to limit the defendant's opening statement to evidence he planned to present during his case-in-chief. Id. at 394. The trial court sustained the motion. Id. At trial, after the state's opening statement, defense counsel "again requested to make an opening statement." Id. The trial court refused to change its ruling, but defense counsel delivered a short opening statement nonetheless. Id.

This Court found not only that the trial court erred, but that its error prejudiced the defendant. Id. at 395-96. The foundation of this Court's prejudice analysis appears to rest on the volume of the state's evidence at trial as well as the circumstantial nature of that evidence. Id. at 395. This Court found that in light of the circumstantial evidence as well as the lengthy trial, the absence of an opening statement prejudiced appellant. Id.

This Court's decision Thompson does not control in this case because the error in this case is unappealable and unpreserved, and because appellant did not suffer manifest injustice due to the paltry nature of his offer of proof as well as brevity of the cross-examination at trial.

In Thompson, counsel preserved the defendant's claim by objecting before trial to the court's ruling on the state's motion in limine and by offering at trial a brief opening statement–providing the appellate court something by which to evaluate a lengthier opening statement. Id. at 394. Counsel in this case, however, failed to preserve appellant's claim because she merely drew a conclusion as to what she thought the court would rule, but made no attempt, as did counsel in Thompson, to offer any opening statement or ask the trial court to reconsider its ruling at trial (Tr. 130). Cole, *supra*

Furthermore, Thompson, was "the kind of case where an effective opening can make a difference" due to the lengthy and complex nature of the evidence, while in contrast, the evidence in this case was direct, and simple. Thompson, *supra* at 395. The evidence in this case was adduced through seven witnesses over one day, comprising 171 transcript pages (Tr. 131-302). Id. In Thompson, the state consumed three days presenting fifteen witnesses and needed a 25-page "elaborate" opening statement to detail the complexity of the evidence as opposed to less than one-third of that in this case–7.5 pages (Tr. 122-130). Id. In this case, not only was there less evidence, but the evidence was also simpler and more direct than that in Thompson. Thus, the importance this Court attributed to the absence of an opening statement in Thompson does not exist in this case because of the brevity of the trial and the simpler, more direct nature of the evidence.

Contrary to appellant's contention that the state had a "circumstantial case" (App. Br. 14), there was direct evidence of appellant's guilt: the victim, Ms. Kaufman, identified appellant at a pre-trial lineup (Tr. 170-71, 173, 198, 200, 228), and testified at trial that she had

"no doubt" that appellant was the person who attacked her (Tr. 176-77, 198-99). Thus, unlike the circumstantial, voluminous nature of the evidence in Thompson, the evidence in this case consisted of direct evidence of appellant's guilt adduced in less than one day (Tr. 131-302). Id.

As a result, Thompson is not controlling authority in this case because of the lack of preservation as well as manifest injustice. Hence, appellant's claim on appeal fails.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays that this Court affirm appellant's conviction and sentence.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 4,511 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of November, 2002, to:

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